

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 20, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP485-CR

Cir. Ct. No. 2013CF158

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICK J. GURHOLT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Rick Gurholt appeals a judgment convicting him of three counts of sexually assaulting his eleven-year-old stepdaughter, Nancy.¹ He also appeals an order denying his postconviction motion, in which he alleged ineffective assistance of trial counsel. Gurholt contends his counsel was ineffective for: (1) questioning witnesses regarding accusations by his wife, the victim’s mother, that Gurholt looked at child pornography on his computer; and (2) failing to call Rusty Gurholt, his cousin, as a witness to contradict accusations that Rusty pressured the victim into withdrawing her accusations. He also seeks a new trial in the interest of justice, claiming the real controversy was not fully tried. We reject these arguments and affirm both the judgment and the order.

BACKGROUND

¶2 Nancy initially reported being sexually assaulted by Gurholt to her aunt, who then notified the police. Sergeant Wang Lee and social worker Heather Wesner interviewed Nancy, who gave them a detailed description of three assaults. Nancy also said Gurholt told her he would buy her a Kindle for her birthday as a bribe to keep her from reporting the assaults.

¶3 Nancy’s mother, Ann,² initially did not believe the allegations, and she blamed Nancy for causing Gurholt to be jailed. At some point after police began investigating the incidents, Ann became angry with Nancy for reporting them, and she called Nancy “a ho and a slut.” When Lee and Wesner interviewed

¹ Pursuant to WIS. STAT. RULE 809.86(4) (2015-16), we use a pseudonym instead of the victim’s name. All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² For the reader’s convenience, and to protect the victim’s mother’s privacy, we refer to her with a pseudonym.

Ann, she told them she suspected something because Gurholt would go into Nancy's bedroom late at night, and if she went in to check on them, Gurholt would threaten to hit her. Ann also claimed she caught Gurholt watching pornography on his computer, which included images of young girls with underdeveloped breasts and minimal pubic hair. Police seized the computer and found no child pornography on it.

¶4 In a telephone call from the jail, Gurholt urgently asked Ann that his cousin, Rusty, visit him at the jail. Recorded phone conversations show that after Rusty's visit, Gurholt engaged in cryptic conversations with Ann suggesting important messages had been conveyed among the three of them. Shortly thereafter, Nancy was taken to Gurholt's attorney's office, where she recanted her accusations. She said she lied about Gurholt assaulting her because she was mad at him for punishing her and her siblings.

¶5 Ann also told Gurholt's attorney that Nancy confessed to her that she lied about the assaults, and Ann claimed she did not coach the victim to recant. Ann also said she herself lied about Gurholt being in the victim's room late at night because she was mad at him at the time. In subsequent phone conversations with Ann, Gurholt asked whether "little cherish" had made a statement. Ann did not understand at first, but after Gurholt said "who do you think I mean," she responded "it went well, it's good." A few days later, however, as their relationship soured again, Gurholt and Ann argued over the phone. In that call, Ann said to Gurholt that he had Rusty tell her to have Nancy talk to Gurholt's attorney. Nancy told investigators that her mother and Rusty told her she had to say the assaults did not happen because that was the only way Gurholt could get out of jail.

¶6 At Gurholt's trial, Nancy testified that the assaults occurred. Ann, now supporting Nancy's allegations, also testified for the State. On cross-examination, Gurholt's attorney brought out numerous inconsistencies between the testimony of Nancy and Ann and their respective statements to police and to Gurholt's attorney.

¶7 Gurholt's counsel also questioned witnesses regarding Ann's allegations that Gurholt viewed child pornography on his computer, and whether child pornography was found on the computer. The first such witness was Wesner, who was asked on cross-examination whether Ann had ever raised the issue of seeing child pornography on Gurholt's computer; she responded Ann said something about images on the computer, but not specifically child pornography. Counsel later asked Ann, again on cross-examination, three questions regarding: whether she raised the child pornography issue with investigators (she had); if the computer was taken from their home (it was); and whether any child pornography was found on it (she did not know).

¶8 On direct examination by the State, Lee testified that no child pornography was found on the computer when it was analyzed by the State's forensic analyst. Lee further testified, however, that "just because someone watches pornography at some point doesn't mean that they saved it to the computer." He also testified that the absence of child pornography on the computer did not necessarily mean Ann's allegation was a lie.

¶9 In her closing argument, the district attorney argued that even if the investigators did not find child pornography on Gurholt's computer, that does not mean it was not there earlier. In her closing argument, Gurholt's attorney challenged Ann's credibility, but she did not make a particularized attack on

Ann's testimony regarding the child pornography. The jury convicted Gurholt of the three sexual assaults, but it found him not guilty of one count of child enticement.

¶10 Gurholt's postconviction motion alleged ineffective assistance of counsel based on his counsel's unilateral introduction of the question of child pornography and counsel's failure to call Rusty as a witness to contradict the assertion that Rusty had induced Nancy to recant. At the *Machner*³ hearing, counsel explained that she broached the accusation of child pornography in an effort to undermine Ann's credibility. She explained the defense theory was to show that Ann wanted to get Gurholt in as much trouble as possible and that the assaults were fabricated. Counsel also testified that she made an intentional decision not to call Rusty as a witness because he had over twenty criminal convictions, the recorded cryptic telephone conversations from the jail suggested Rusty was involved in Nancy's recantation, and she did not believe the jury would find Rusty credible. At the postconviction hearing, Rusty denied ever talking to Nancy about withdrawing her accusations. He said the urgent visit to the jail was just to pass along Gurholt's message to Ann "that he didn't do it and that he loved her, and you know, the truth would come out."

¶11 The circuit court denied the postconviction motion, concluding Gurholt was not prejudiced by his counsel's questions regarding the alleged child pornography, which were designed to attack Ann's credibility. Because of the way the issue was broached, the tone of the questions, the fact that no child pornography was found on the computer, and the likely minimal impact of the

³ *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

questions, the court found Gurholt failed to establish prejudice, even assuming his counsel performed deficiently by raising the matter.

¶12 Regarding counsel's failure to call Rusty, the circuit court found Gurholt failed to establish either deficient performance or prejudice. The court found Rusty's postconviction testimony that he had not attempted to persuade the victim to recant her accusations not credible for several reasons. It noted Rusty's numerous convictions, his addiction issues and drug history, that Gurholt and Rusty are relatives, the recorded telephone conversations strongly suggesting collusion, that the timing of the recantations corresponded with the phone calls and Rusty's visit to the jail, and Rusty's implausible assertion that the urgent visit was for the purpose of passing along Gurholt's statement to Ann that he loved her. The court also found Rusty would not make a good witness based on his demeanor at the postconviction hearing.

DISCUSSION

¶13 A defendant claiming ineffective assistance of counsel must establish both deficient performance and prejudice to his or her defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish deficient performance, Gurholt must show his counsel's representation fell below an objective standard of reasonableness. *See id.* at 668. Judicial scrutiny of counsel's performance is highly deferential and must be conducted to eliminate the distorting effects of hindsight. *Id.* at 689. This court indulges a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, and Gurholt must overcome the presumption that counsel's decisions were sound trial strategy. *See id.* Reasonable strategic

choices informed by a thorough investigation of the law and facts are virtually unchallengeable. *Id.* at 690.

¶14 To establish prejudice, Gurholt must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *See id.* at 694. A reasonable probability is one that undermines our confidence in the outcome. *Id.*

¶15 Gurholt established neither deficient performance nor prejudice from his counsel's brief questions regarding his wife's accusation that Gurholt viewed child pornography. Counsel's effort to establish Ann's prior unsubstantiated allegations of criminal activity, especially that involving harm to children, constitutes a reasonable strategy that is virtually unchallengeable on appeal. *Id.* at 690. That counsel's strategy was unsuccessful does not mean it was legally insufficient. *State v. Maloney*, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620, *aff'd*, 2006 WI 15, 288 Wis. 2d 551, 709 N.W.2d 436. The circuit court also correctly concluded that Gurholt failed to establish prejudice because the questions related to Ann's credibility and the undisputed fact that no child pornography was found on his computer. Therefore, Gurholt has not shown a reasonable probability that this counsel's questions affected the verdict.

¶16 Gurholt also fails to establish deficient performance or prejudice from his counsel's decision not to call Rusty. For the reasons the circuit court noted, it is unlikely the jury would have believed Rusty's denial that he influenced Nancy to recant her accusations. Gurholt argues that there was no reason not to present Rusty's testimony because the worst thing that could happen was that the jury would not believe him. To the contrary, trial counsel could reasonably decide not to create a dichotomy in which the jury's rejection of Rusty's testimony would

bolster the victim's testimony. Gurholt also failed to establish prejudice from his counsel's strategic decision because counsel's failure to present implausible testimony does not undermine our confidence in the outcome. *See Strickland*, 466 U.S. at 694.

¶17 Finally, Gurholt has not established a basis for granting a new trial in the interest of justice. We conclude Gurholt has not established ineffective assistance of trial counsel, and the issues were fully and fairly tried.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

